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No. 80-464

# In the Supreme Court of the United States

OCTOBER TERM, 1980

DORIS M. DICKISON, ET AL., PETITIONERS

*v.*

NEIL GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### QUESTION PRESENTED

Whether the preparation of an environmental impact statement on a twelve-mile section of highway was an improper segmentation of a larger federal project under the National Environmental Policy Act of 1969.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11a-20a) is not reported. The opinion of the district court (Pet. App. 1a-10a) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on June 19, 1980. The petition for a writ of certiorari was filed on September 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case concerns the construction of a twelve-mile portion of a proposed highway known as Supplemental Freeway FAP 405 in Peoria County, Illinois. In 1969, the State of Illinois initiated a corridor study for a highway that would begin at the junction of Interstate 74 and Interstate 474 west of Peoria, Illinois, and extend approximately 40 miles north to Interstate 180. The corridor study was developed pursuant to then applicable Federal Highway Administration (FHWA) procedures (PPM 20-8, January 14, 1969) and included two public meetings and preparation of an environmental impact statement (EIS) on the selection of a corridor for the proposed highway. The FHWA accepted the final corridor EIS on April 5, 1972, and gave corridor approval on June 15, 1972 (Fed. Defs. Exh. 1 at 1-3).

In 1972, the State began design and location planning for the initial section of highway to be built within the corridor (*id.* at 3). The southern terminus for this section is the junction with Interstates 74 and 474; the selected northern terminus is the intersection of County Highway 25 (Cedar Hills Drive). The northern terminus was chosen because County Highway 25 offered an efficient connection with Highway 29, the existing north-south

highway; and because of the location of major traffic generators, the Caterpillar Tractor Company and Pioneer Industrial Park, in this area. This segment of FAP 405 was selected for priority construction because it will serve greater volumes of traffic (estimated at 23,000 vehicles per day in 1990) than the more northerly portions of the highway (estimated at 13,000 vehicles per day in 1990) (Pet. App. 17a & n.6).

A draft environmental impact statement was prepared in September 1972 and a public hearing on the location of the twelve-mile segment was held on November 2, 1972.[1] On February 16, 1973, the State transmitted a preliminary copy of the final EIS to the FHWA. After revisions, it transmitted the final EIS to FHWA on January 14, 1975. The FHWA adopted the final EIS on August 3, 1976, and granted design approval on September 13, 1976 (Fed. Defs. Exh. 1 at 3-5).

The final EIS discusses an alternative alignment for the twelve-mile segment of FAP 405, and a "no-build," improvement of existing roads, alternative. Several design modifications are also considered (State Defs. Answer Exh. 3 at 93-119). The EIS states that the proposed alignment would require more cropland (575 acres) than the alternative alignment (430 acres). The statement also includes a comparative estimate of the crop loss due to the highway improvement (*id.* at 109, 128-134).

2. On January 12, 1979, petitioners filed this action against the Secretary of Transportation, officials of the Federal Highway Administration, and officials of the State of Illinois (Complaint at 1, 6). Petitioners, owners of farmland required for FAP 405, alleged that the

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[1]After revisions were made to the plan, a public information meeting was held on September 11, 1975.

defendants had violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), because the twelve-mile section of FAP 405 was unlawfully segmented from the entire proposed project, and because the final EIS failed adequately to address the consequences of the loss of farmland (Complaint at 7-10). The complaint requested injunctive relief against further action, including acquisition of the right-of-way, construction and disbursement of funds, and a declaratory judgment that the defendants had violated the provisions of NEPA (*id.* at 11-12).

On April 25, 1979, the federal defendants filed a Motion to Dismiss the Complaint or in the Alternative for Summary Judgment. The memorandum filed in support of this motion was supplemented with an affidavit describing the administrative decision and a summary of the federal administrative record (Fed. Defs. Exhs. 1-3; Affidavit of Jay Miller). The state defendants also filed an answer, a motion to dismiss, and a motion for summary judgment. In support of these motions, the state defendants filed the state administrative record, including the corridor EIS, the design EIS, and public hearing transcripts and memoranda (State Defs. Answer Exhs. 1-5). Affidavits of state highway officials were also filed to explain the administrative decision to build the twelve-mile section of FAP 405 (State Defs. Motion Exhs. 1-2).

The petitioners filed an opposition to the motions of the federal and state defendants. They each filed a personal affidavit, substantially identical, stating that they owned farmland required for the FAP 405 project, that they are opposed to the project, that they participated at public meetings on the project and that they were always told by the officials that the entire 39.8-mile highway would be built (Pet. App. 9a).

On June 29, 1979, the district court granted summary judgment for the respondents (Pet. App. 1a-10a). It ruled that under the test set out in *Swain* v. *Brinegar*, 542 F. 2d 364 (7th Cir. 1976), the twelve-mile highway project was not illegally segmented, and that the decision to proceed with the project should not be disturbed on judicial review (Pet. App. 8a-10a). It also found that the petitioners' affidavits raised no material issues of fact which precluded entry of summary judgment (Pet. App. 9a).

The court of appeals affirmed (Pet. App. 11a-20a). It held that the district court properly applied the tests of *Swain* v. *Brinegar*, *supra*, and agreed that FAP 405 had not been improperly segmented (Pet. App. 16a-19a). The appellate court also ruled that the EIS adequately considered the adverse consequences of the taking of farmland for the project (Pet. App. 20a).

## ARGUMENT

This case presents no issue warranting review by this Court. The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Petitioners' main contention is that the respondents have illegally segmented proposed FAP 405, resulting in an inadequate environmental impact statement. The court of appeals' rejection of that claim was an application of well settled, consistent case law to the factual situation presented in this case.

Shortly after the National Environmental Policy Act of 1969 was enacted, the lower federal courts were faced with the task of reconciling the practicalities of highway construction projects with the comprehensive review requirements imposed by the statute. Specifically, state highway departments typically prepared comprehensive

and visionary highway development programs contemplating thousands of miles of highway improvements within the state. The courts unanimously held that an EIS on these statewide development programs need not be prepared before federal funding could be made available for an individual highway improvement project. *E.g., Indian Lookout Alliance* v. *Volpe*, 484 F. 2d 11, 16 (8th Cir. 1973); *Patterson* v. *Exon,* 415 F. Supp. 1276 (D. Neb. 1976).

The existing federal highway funding procedures as well as highway construction practices, moreover, required highway improvements to be broken up into projects or sections. The issue was the proper length of a highway segment to be included in an EIS to permit adequate consideration of the environmental consequences of the project. In resolving this question, the courts were aided by the regulations issued by the FHWA. These regulations currently provide:

> A highway section should be as long as practicable to permit consideration of environmental matters on a broad scope and meaningful evaluation of alternatives. A highway section may include, when appropriate, completed as well as uncompleted portions of the highway and one or more future highway projects.

23 C.F.R. 771.5(a). This is consistent with the Council on Environmental Quality NEPA regulations, 40 C.F.R. 1508.25.

The courts developed a test to determine whether a highway section was an appropriate length to constitute federal agency action for environmental review under NEPA. The basic requirement is that the highway section be of independent utility, with logical termini. *Swain* v.

*Brinegar*, 542 F. 2d 364, 369 (7th Cir. 1976); *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 531 F. 2d 637, 639-640 (2d Cir. 1976); *Indian Lookout Alliance* v. *Volpe*, *supra*, 484 F. 2d at 19-20; *Committee to Stop Route 7* v. *Volpe*, 346 F. Supp. 731, 740 (D. Conn. 1972); *Patterson* v. *Exon*, *supra*, 415 F. Supp. at 1282; *Citizens' Committee for Environmental Protection* v. *United States Coast Guard*, 456 F. Supp. 101, 120 (D.N.J. 1978); *Joseph* v. *Adams*, 467 F. Supp. 141, 157 (E.D. Mich. 1978). See *Citizens for Mass Transit Against Freeways* v. *Brinegar*, 357 F. Supp. 1269, 1284 (D. Ariz. 1973).[2] The highway segment, moreover, must not significantly foreclose alternative routes or locations for an extension of the highway system from the segment chosen. *Swain* v. *Brinegar*, *supra*, 542 F. 2d at 369; *Indian Lookout Alliance* v. *Volpe*, *supra*, 484 F. 2d at 17-18; *Committee to Stop Route 7* v. *Volpe*, *supra*, 346 F. Supp. at 740; *Patterson* v. *Exon*, *supra*, 415 F. Supp. at 1282; *Joseph* v. *Adams*, *supra*, 467 F. Supp. at 157. Finally, if the proposed segment is part of a larger plan, implementation of the entire plan should not be imminent. *Swain* v. *Brinegar*, *supra*, 542 F. 2d at 369; *Joseph* v. *Adams*, *supra*, 467 F. Supp. at 157.

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[2]See also *Named Individual Members of San Antonio Conservation Society* v. *Texas Highway Department*, 446 F. 2d 1013, 1022-1024 (5th Cir. 1971); *Thompson* v. *Fugate*, 347 F. Supp. 120, 123 (E.D. Va. 1972); *River* v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, 635-636 (E.D. Va.), aff'd, 481 F. 2d 1280 (4th Cir. 1973); *Citizens for Balanced Environment and Transportation, Inc.* v. *Volpe*, 376 F. Supp. 806, 813-814 (D. Conn.), aff'd, 503 F. 2d 601 (2d Cir. 1974); *Scottsdale Mall* v. *State of Indiana*, 418 F. Supp. 296, 302 (S.D. Ind. 1976). These cases considered the related question of whether an entirely state-financed highway segment constitutes federal action subject to NEPA because of its relationship to federal aid highways.

The district court and the court of appeals applied these established standards to the twelve-mile section of road studied in the design and location environmental impact statement. They found the southern and northern termini of the highway to be logical, and the twelve-mile segment to have an independent utility as a by-pass of congested Peoria (Pet. App. 8a-9a, 17a-18a). The lower courts also found that alternative locations and routes for further expansion of FAP 405 north to Interstate 180 were not foreclosed by the twelve-mile segment and that completion of the entire project was not assured nor imminent (Pet. App. 8a-9a, 18a-19a). Accordingly, the courts ruled that the twelve-mile section of highway was not improperly segmented from a larger federal project for environmental review under NEPA.[3]

The opinion of the court of appeals is entirely consistent with the rulings of other federal courts on the issue of highway segmentation. The legal standards developed by the lower federal courts governing the issue of highway segmentation are well established and stable. They conform both to the Council on Environmental Quality's NEPA regulations and to the implementing regulations of the Federal Highway Administration. As one of the many subsidiary issues encountered correlating federal agency action to the NEPA process, highway segmentation is not an issue of pressing national importance.

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[3]In the present case, the respondents prepared and filed a corridor EIS evaluating the entire 39.8-mile highway project between Interstates 74 and 180. Use of a broader scale EIS prepared at a preliminary stage, and site-specific EISs on smaller parts of a program are expressly authorized in the CEQ regulations. 40 C.F.R. 1508.28.

2. Contrary to petitioners' claims, the district court's entry of summary judgment in this case was proper and in accordance with the rulings of this Court. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971), this Court stated that courts reviewing agency action were to "engage in a substantial inquiry" and a "probing, in-depth review." Such a review, however, was not to be a trial de novo of the agency decision. *Ibid.* Instead, as this Court explained in *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973), the focal point of judicial review is the administrative record already in existence and not a new record made initially in the district court. If the administrative record does not adequately explain the administrative action, the record should be supplemented with affidavits or testimony explaining the reasons for the agency decision. *Id.* at 142-143.

In the present case, the district court record was composed of the administrative record, including the EIS and supporting studies, and litigation affidavits of the state and federal defendants, explaining the reasons for the agency decision. These items comply with this Court's directives in *Overton Park*, *supra*, and *Camp* v. *Pitts*, *supra*.

Summary judgment was properly entered by the district court because petitioners' affidavits filed in opposition to the respondents' motion wholly failed to raise material issues of fact. Those affidavits merely recited their ownership of land traversed by FAP 405, their opposition to the project, and their understanding that the entire 39.8-mile highway would be built. Mere disagreement with the opinions expressed in an EIS or reiteration of the adverse effects of the proposed project disclosed in the EIS do not raise material issues of fact. *Upper West Fork River Watershed Ass'n* v. *Corps of Engineers*, 414 F.

Supp. 908, 914-915 (N.D. W.Va. 1976), aff'd, 556 F. 2d 576 (4th Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *Citizens for Mass Transit, Inc.* v. *Adams,* 492 F. Supp. 304, 311 (E.D. La. 1980).

Petitioners' claim to this Court that the selection of the highway route through their property was arbitrary and capricious due to improper political considerations was not supported by specific factual affidavits in opposition to summary judgment in the district court. Accordingly, the proceedings in the district court did not violate the provisions of Rule 56, Fed. R. Civ. P.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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